ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF VICTIMS (INCLUDING NAME OF DECEASED) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. REFER PARAGRAPH [78] AND SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT INVERCARGILL

I TE KŌTI-Ā-ROHE
KI WAIHŌPAI

CRI-2018-025-000367
[2022] NZDC 20656

WORKSAFE NEW ZEALAND
Prosecutor

v

TRANSPORT SERVICES SOUTHLAND LIMITED
HERBERTS TRANSPORT LIMITED
Defendants

Hearing:	20 October 2022
Appearances:	B Finn for the Prosecutor WorkSafe New Zealand J W Cowan for the Defendants
Judgment:	20 October 2022
Reasons:	21 October 2022

NOTES OF JUDGE N A WALSH ON SENTENCING [REASONS]

Introduction

[1] In February 2018, McLellan Freight Limited ("McLellan"), Transport Services Southland Limited ("TSSL"), and Herberts Transport Limited ("Herberts") were charged under ss 36(1)(a), 48(1) and 48(2)(c) of the Health and Safety at Work Act

2015 ("the HSWA") following the death of a worker on 23 February 2017. McLellan was also charged under ss 34(1) and 34(2)(b).

[2] McLellan had a contract with ADM New Zealand Limited ("ADM") to load and unload palm kernel expeller ("PKE") at a shed leased by ADM in South Port, Bluff ("the shed").[1] McLellan contracted TSSL and Herberts to provide trucks and drivers for this purpose.

[3] The deceased was an employee of TSSL. He died after being struck by a loader while working at the shed.

[4] McLellan pleaded not guilty. The charges against McLellan are yet to make it to trial.

[5] TSSL and Herberts pleaded guilty on 3 October 2018 following amendment of the charging documents and summary of facts. They now appear for sentencing.

[6] The charge against TSSL reads as follows:

> Being a PCBU, failed to ensure so far as was reasonably practicable, the health and safety of a worker who worked for the PCBU, namely [the deceased] while he was at work in the business or undertaking, namely driving a truck and loading and unloading PKE at ADM New Zealand Limited's transitional facility, and that failure exposed [the deceased] to a risk of serious injury arising from working in close proximity to other trucks and mobile plant.

[7] Herberts is similarly charged:

> Being a PCBU, failed to ensure so far as was reasonably practicable, the health and safety of other persons, including [the deceased], who worked for Transport Services Southland Limited, was not put at risk from work carried out as part of the conduct of the business or undertaking, namely operation of the Hyundai Loader owned and operated by HTL [Herberts] at ADM New Zealand Limited's transitional facility.

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[1] The shed is divided into two separate storage facilities. ADM stores PKE in the front part of the shed, which is operated by McLellan. The back part of the shed is managed by Herberts. Unless otherwise specified, all references to "the shed" are to the front part of the shed, which is where the incident occurred.

The facts

[8] ADM imports PKE from Indonesia. ADM would advise McLellan when a ship carrying PKE was on its way to Bluff and tell them how much PKE needed to be unloaded from the ship and stored in the shed. McLellan would then instruct other parties to complete the various aspects of this task.

[9] On the night of the incident, TSSL and Herberts had each supplied two trucks and two drivers to McLellan to assist with the unloading of a ship. Inside the shed there were also two "loaders": a Hitachi loader owned by McLellan, and a Hyundai loader owned by Herberts. These were used to pile up the PKE that was offloaded into the shed by the other trucks. The vehicles would often cross paths as they carried out these various tasks inside the shed.

[10] PKE poses a biosecurity risk; therefore, certain procedures needed to be followed when offloading it into the shed.[2] The policy was that all workers were to adhere to McLellan's procedures within the shed. McLellan uses standard operating procedures for unloading vessels and tipping PKE into the shed.

[11] To meet biosecurity requirements, the trucks would be checked for any excess PKE as they exited the shed. This would involve drivers moving their trucks through the exit door so that only the tail end of the vehicle remained inside the shed. Workers would then use a wand and an air compressor situated near the exit door to check for and blow off any excess PKE. Workers would also check that the tail doors on the trucks were closed properly.

[12] McLellan had an ad hoc procedure of using a "spotter" to do the exit checks. The spotter would be stationed by the exit door so that the drivers would not need to exit their trucks. They would also be situated so that they could see the position of all the vehicles. However, there was no specific worker employed as the spotter, and this role was usually fulfilled by one of the loader drivers. Workers were not always

[2] For this reason, the shed is considered a "transitional facility" for the purposes of the Biosecurity Act 1993.

available to act as a spotter, so drivers would often have to carry out the exit check themselves.

[13] At approximately 1.30 am on 23 February 2017, the deceased tipped a load of PKE inside the shed and then moved his truck to the exit doors. He stopped his truck so that the tail end remained inside the shed, got out, and walked to the back of the vehicle. While he was standing at the back of the truck, he was struck by the Hyundai loader driven by another worker.

[14] Upon realising what had happened, that person and the other workers stopped their vehicles and ran to assist him. Workers administered first aid and provided CPR until the ambulance arrived. Sadly, the deceased could not be revived. The post-mortem examination states that the deceased died of massive traumatic chest injuries.

The WorkSafe investigation

[15] WorkSafe was notified on 24 February 2017 and commenced an investigation. As a result of the investigation, WorkSafe identified:

(a) McLellan had ineffective traffic plans and inadequate designated zones in the front part of the shed.

(b) Herberts and TSSL failed to ensure there was an appropriate traffic management system in place prior to commencing work at the shed.

(c) The Hyundai loader had blind spots which partially restricted the view of the driver. This risk was not eliminated or minimised.

(d) The deceased was wearing a hi-visibility t-shirt, which did not adhere to the recommended clothing for low-light traffic areas. TSSL requires all its drivers to wear hi-visibility vests. The deceased was provided with one but was not wearing it at the time of the incident.

(e) Communication between the trucks entering the shed and the loaders inside the shed was inconsistent, even though every vehicle was equipped with a CB radio.

(f) The "spotter" would alternate between driving the Hitachi loader and acting as the spotter. At the time of the incident, the spotter was driving the loader. This meant drivers had to carry out their own checks at the rear of their vehicles upon exiting the shed.

The "reasonably practicable" steps available

[16] TSSL and Herberts were aware of the shed operation. They knew that vehicles inside the shed could sometimes cross paths, and that there were workers in the vicinity. It was reasonably practicable for TSSL and Herberts to have:

(a) inquired prior to undertaking work to ensure that there was a safe system of work (including an effective traffic management plan) in respect of workers undertaking loading and unloading activities in ADM New Zealand Limited's transitional facility at South Port, Bluff; and

(b) addressed and remedied potential issues with controls with McLellan Freight Limited (as the PCBU controlling the workplace) if a safe system of work was not identified prior to that work commencing.

[17] Failure to take these steps exposed the deceased to a risk of serious injury or death.

Relevant purposes and principles of sentencing

[18] When sentencing an offender under s 48, s 151 of the HSWA instructs the Court to apply the Sentencing Act 2002 ("the SA"). It also highlights particular features to which the Court must have particular regard. At this stage, it is appropriate to consider

the purpose of the HSWA, and the purposes and principles of sentencing contained in ss 7 and 8 of the SA.[3]

[19] The purposes of the HSWA relevantly include:[4]

> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant;
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
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> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[20] I also note that ensuring the "the health and safety of workers" is a PCBU's 'primary duty of care' under the HSWA.[5]

[21] Against that background, sentencing under the HSWA will generally require significant weight to be given to the ordinary sentencing purposes of denunciation, deterrence and accountability.[6] I also consider providing for the interests of the victims, and providing reparation, to be relevant purposes in the circumstances of this case.[7]

[22] I consider the most relevant principles to be the culpability of the offender; the seriousness of the offence; the general desirability of consistency; the effect of the offending on the victims; and the need to impose the least restrictive outcome appropriate in the circumstances.[8]

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[3] See Health and Safety at Work Act 2015, s 151(2)(a) and (b).
[4] Health and Safety at Work Act 2015, s 3(1).
[5] Section 36.
[6] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [43].
[7] Sentencing Act 2002, s 7(1).
[8] Section 8.

Sentencing approach

[23] *Stumpmaster v WorkSafe New Zealand* set out a four step approach for sentencing offenders under the HSWA:[9]

i. assess the amount of reparation;

ii. fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

iii. determine whether further orders under ss 152-158 of the HSWA are required; and

iv. make an overall assessment of the proportionality and appropriateness of the "combined packet of sanctions" imposed by the preceding three steps.[10]

[24] I will address each of these matters in the prescribed order.

Step one: reparation

[25] Reparation may be imposed for the loss of or damage to property, emotional harm, and other consequential loss or damage.[11] Here, consideration needs to be given to the emotional harm and consequential loss suffered by the victim's family.

Victim impact statements

[26] This court has had the benefit of three victim impact statements, prepared by the deceased's wife, and their daughters aged 24 and 15. This has been an extraordinarily difficult process for all of them. I am grateful for the courage and perseverance they have shown in preparing these statements. The three victim impact

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[9] Stumpmaster, above n 6, at [3].
[10] This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.
[11] Sentencing Act 2002, ss 32 and 38.

statements make for heartfelt and harrowing reading. The impact of the death on the family has been devastating and far-reaching.

[27] I have come to understand the kind of man that the deceased was. His wife describes him as a "homely" person. She says he was happiest at home "tinkering away" in the garage, making things out of knick-knacks. The impression I received from reading the three statements was that this was a humble, hard-working, loving and close family of modest means who enjoyed each other's company. The deceased's widow disclosed:

> [The deceased] was my best friend. We had been married for 17 years but been together for 20 years. We met through a mutual truck-driving friend. [His] death was so sudden and it was difficult becoming a solo mother instantly. Everything was suddenly on my shoulders. I don't have a backboard any more. I don't have that someone to talk to and bounce things off ... There is a lot of uncertainty for the future. I am upset that we will miss out on experiencing our daughters getting married or starting families together. The thought of going into retirement alone is also daunting ...

[28] The eldest daughter remembers the close relationship she shared with her father. She would tell him most things and says he was not afraid to show his emotional side. She has fond memories of spending time with him and his trucks. Her father stood up for what he believed in and would 'take the bull by the horns' when he was passionate about something.

[29] The youngest daughter adds that her father was extremely loved. He was funny and he spent his life doing what made him and the people around him happy. He was her best friend.

[30] The impact the deceased's death has had on his family has been immense. His wife describes the difficulty of suddenly becoming a solo mother. She has had to sacrifice her job and put her own grief to one side so that she could be there for her children, who have both struggled. At times, she has felt like a failure. Their youngest daughter, in particular, was diagnosed with severe anxiety and depression. She says that she stopped going to school because she couldn't see the point anymore. She became very anxious about spending time away from her mum, to the point where she slept in her bed for about a year. Their eldest daughter also became very closed off and resorted to alcohol. She has only recently become comfortable being home by

herself but is still obsessive about people being late. It is upsetting for all of them that a loved father and husband will not be around to share in the important moments that are yet to come in their lives.

[31] The victims have been waiting for an outcome for more than five and a half years now. They have repeatedly been given court dates, only to have them postponed at the last minute. They feel as though they have been left in the dark and that their needs have not been a priority. Being very aware of the victims feelings, I delivered an executive summary of my sentencing on 20 October 2022 to avoid all further delay and to minimise any feelings of confusion and frustration in hearing or reading a very lengthy technical decision. I did not see it as my role to enquire into the reasons for the delay. I infer there are multiple reasons, particularly when there are three defendants and one has maintained a not guilty plea, but COVID-19 has also played its part. I find WorkSafe New Zealand made the correct judgment call in seeking that this sentencing proceed before the defended hearing involving McLellan.

Approach to reparation

[32] WorkSafe suggests that any reparation order should be apportioned in accordance with the respective culpability of the three defendants. Herberts and TSSL would be ordered to pay their share of the reparation in the usual 28 days' time. If McLellan is acquitted (or, for some other reason, not required to pay the reparation) WorkSafe says the Court can send notice to Herberts and TSSL, requiring them to pay the balance of the reparation owing.

[33] WorkSafe has relied on the decision of Judge Sinclair in *Shoreload & Propping* in support of this approach.[12] Incidentally, Judge Sinclair relied on the decision in *Hughes Partners*.[13] However, Judge Sinclair was mistaken as to the circumstances in *Hughes* – it was not a case where the other party had not been convicted. In *Hughes*, the co-defendant, Greta, had been convicted by formal proof because they had failed to appear in Court. The Court apportioned the reparation 40:60 between Greta and Hughes, with Hughes' assurance that they would pay Greta's share if Greta had not

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[12] *WorkSafe New Zealand v Shoreload & Propping Ltd* [2016] NZDC 5273.
[13] *WorkSafe New Zealand v Hughes Partners Ltd* [2015] NZDC 20545.

done so within three months. Hughes' right to pursue Greta for its proportion of the reparation was acknowledged and reserved.

[34] The difficulty with the suggested approach is that McLellan, unlike Greta, is not being sentenced, nor have they been convicted. There is an element of unfairness in fixing McLellan's portion of the reparation before they have been sentenced or heard on the matter. Indeed, it is doubtful that this sentencing is capable of binding McLellan. However, a practical approach is required. The victims have already waited far too long for reparation; an adjournment at this point would be intolerable.

[35] Today the Court will proceed as follows:

(a) first, determine the total reparation figure for emotional harm and consequential loss owing to the victims – this will be the reparation that forms part of Herberts' and TSSL's sentence;

(b) second, determine the share of that figure to be paid by Herberts and TSSL now, based on their relative culpability and amounts that have already been paid;

(c) third, make an order that Herberts and TSSL pay this share within 28 days;

(d) fourth, direct that Herberts and TSSL undertake to pay the balance of the total reparation figure, if that balance has not been paid for any reason following the outcome of McLellan's trial, and (if applicable) their sentencing.

[36] This approach does not restrict the discretion of any sentencing judge should McLellan appear for sentence. Rather, the outcome of this sentencing will be something to take into account.

Emotional harm

[37] Determining the appropriate amount for emotional harm reparation is a near impossible task. No sum of money can fill the void left by the deceased's death. Regardless, the Court must try to strike a figure which is just in all the circumstances and which compensates for the anguish, distress, and mental suffering arising from the offence.[14]

[38] Necessarily, it is a fact specific exercise:[15]

> The task of setting reparation for emotional harm in a case such as this, does not simply involve ordering the same amount given in other cases involving a fatality. Each case must be judged on its particular circumstances. While certain cases may give a broad indication of an appropriate figure, it is unhelpful to pick apart those decisions and try to pair particular features with a particular level of reparation. There is not and cannot be a tariff for the loss of life or grief.

[39] Nevertheless, as Nation J observed in *Ocean Fisheries*:[16]

> In the absence of a statutory cap or statutory formula for the allocation of reparation for emotional harm for close family members, Judges have to rely heavily on awards that have been made in other cases to arrive at an appropriate reparation award for the particular case they have been concerned with. So, consistency with the range of awards commonly ordered has been an important consideration in fixing reparation, even when Judges have said that each case must be considered on its own facts.

[40] WorkSafe submits, having regard to the Schedule in *Ocean Fisheries*, that emotional harm reparation of $130,000 would be well within range, with $80,000 going to the deceased's widow, and $25,000 going to each of his daughters. It is suggested that this sum be awarded to the family so that they may apportion it amongst themselves.

[41] Herberts and TSSL agree with WorkSafe's submissions.

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[14] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-322, 5 February 2009 at [19].
[15] *WorkSafe New Zealand v Dept of Corrections* [2016] NZDC 24865 at [25].
[16] *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083 at [123].

[42] I also consider $130,000 to be a suitable award. That sum is near the top of the ordinary range, and rightly so. The deceased's death has been devastating for his family. Furthermore, they have been made to suffer through an extraordinarily long court process which, even after this sentencing, will still be some way from being resolved.

Consequential loss

[43] The consequential loss sought is the loss of the deceased's income. Counsel have identified that the correct approach is to calculate the "statutory shortfall" in the victims' ACC entitlements.[17] This is done by subtracting the compensation payable to the victims under the accident compensation scheme from the "lost pecuniary benefit".

[44] In *Sarginson v Civil Aviation Authority*, the High Court determined it was inappropriate to arbitrarily equate the family's "lost pecuniary benefit" with the deceased earner's ACC entitlement had they survived but been incapacitated (i.e. 80% of the deceased's prior net income).[18] The Civil Aviation Authority ("the CAA") had argued, instead, that the shortfall should be calculated with reference to the deceased's net pre-death income. Justice Mander, however, was reluctant to express a view on this submission. Whichever method is used, "the quantum of reparation remains a matter of assessment for the sentencing court". There are many possible factors which "may lead to a reparation order for consequential loss that is something different from the calculated shortfall".[19]

[45] WorkSafe's accountant, Mr Jay Shaw, has calculated the shortfall using the CAA's approach. This has produced a figure of $120,128. Herberts and TSSL reserved their position to make further submissions on this figure prior to or at

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[17] As a member of the ACC Accredited Employer Programme ("the AEP"), TSSL has been paying the ACC compensation instead of ACC. By joining the AEP, employers can reduce their work levy by up to 90%. It is recommended for employers who pay an annual work levy of over $250,000 (See ACC "Joining the Accredited Employers Programme" (26 June 2019) <www.acc.co.nz>). It should not affect TSSL's liability for consequential loss reparation.

[18] *Sarginson v Civil Aviation Authority* [2020] NZHC 3199 at [194].

[19] At [192].

sentencing. However, the issue was not taken further at sentencing. In any event I see no obvious errors with the calculated figure, nor do I see any reason to depart from it.

Reparation to be paid by Herberts and TSSL on being sentenced

[46] Herberts and TSSL agree that they are equally culpable. WorkSafe proposes that Herberts and TSSL should each be liable for 25% of the above amounts. Herberts and TSSL disagree. They say 20% each would be more appropriate. In their submission, this would better reflect that McLellan is primarily responsible for the offending. In particular, they refer to *Alderson*.[20] There, the reparation was split 65:35 between Alderson and Tegel, where Tegel had failed to make sure Alderson had developed a safe system of work.

[47] Assuming McLellan is later found guilty, I see no issue with Herberts and TSSL paying 25% of the reparation. Logically, a 50:25:25 split would suggest McLellan is roughly twice as culpable as both Herberts and TSSL. That seems more than fair having regard to the wording of the charges against Herberts and TSSL. A lesser proportion would fail to adequately reflect the HSWA's focus on holding PCBUs accountable. The Court must be careful not to allow defendants to deflect responsibility.

[48] This means Herberts and TSSL would each be required to pay:

(a) $32,500 for emotional harm (0.25 × $130,000); and

(b) $30,032 for consequential loss (0.25 × $120,128).

[49] Importantly, Herberts and TSSL have already offered a great deal of support to the deceased's family. Together, they have voluntarily made the following financial contributions:

(a) $56,925.59 towards repaying the mortgage on the family home;

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[20] *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090.

(b) $3,813.66 towards the funeral expenses not covered by ACC;

(c) Repayment of $8,533.04 for a tool-box student loan for the eldest daughter's apprenticeship;

(d) $2,800 (approximately) towards coal for the widow, and gravel; and

(e) $1000 in grocery vouchers.

[50] These contributions, excluding the payments for funeral expenses, are relevant to the amount of consequential loss payable.[21] They cover costs that would have been incurred regardless of the accident, and for which the family would have had the benefit of the deceased's income. The *relevant* contributions total approximately $69,259 (or $34,629.50 each).

[51] Consequently, Herberts and TSSL have already done more than their 'fair share' to compensate for the consequential loss suffered by the deceased's family (in the event McLellan is found guilty). I find that they should not be required to pay anything further for consequential loss.

Conclusions

[52] The total reparation owing to the victims which forms part of this sentence is $250,128:

(a) $130,000 for emotional harm; and

(b) $120,128 for consequential loss.

[53] Within 28 days' of sentencing, Herberts and TSSL will be required to pay $32,500 each, which will go towards emotional harm.

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[21] The funeral expenses constitute a consequential loss *in addition* to the loss of the deceased's income. Therefore, the contributions made by Herberts and TSSL to the funeral cannot fairly be deducted from the calculated shortfall.

[54] I consider $69,259 has already been paid by Herberts and TSSL towards consequential loss. Therefore, at this stage, no further payments are required on that front.

[55] Hence, the balance of the total reparation owing will be:

(a) $65,000 for emotional harm ($130,000 –$65,000); and

(b) $50,869 for consequential loss ($120,128 – $69,259).

[56] If, for any reason, the balance of the total reparation owing has not been met following the outcome of McLellan's trial and/or sentencing, Herberts and TSSL are to pay the balance.

Step two: fine

[57] When fixing the fine at step two, the following guideline bands are to be used:[22]

low culpability:	$0 to $250,000
medium culpability:	$250,000 to $600,000
high culpability:	$600,000 to $1,000,000
very high culpability:	$1,000,000 to 1,500,000

[58] In assessing culpability, s 151 of the HSWA offers specific guidance:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and

[22] Stumpmaster, above n 6, at [4].

(b) the purpose of this Act; and

(c) the risk of, and the potential for, illness, injury, or death that could have occurred; and

(d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and

(e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

(f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[59] In *Stumpmaster*, however, it was held that the above sentencing criteria are covered by the well-established culpability assessment factors identified in *Hanham*:[23]

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the HSWA.

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost, and effectiveness of the means necessary to avoid the hazard.

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[23] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54] cited in *Stumpmaster*, above n 6.

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

Starting point

[60] WorkSafe has submitted that a starting point of $450,000 to $550,000, at the higher end of the medium culpability band, is appropriate. Herberts and TSSL say that the appropriate starting point is, at the very most, $350,000. This would place them in the lower half of the medium band.

[61] Herberts' and TSSL's culpability is to be assessed with reference with the *Hanham* factors listed above:

(a) *Operative acts or omissions*. The "reasonable steps" available to Herberts and TSSL are set out above at [16]. In short, they should have inquired and ensured there was a safe system of work at the shed, and addressed any potential issues with McLellan. Those steps would have been within their "ability to influence and control" procedures at the shed.[24]

(b) *Nature and seriousness of the risk of harm and the realised risk.* Workers were put in the path of moving vehicles. There was a high risk of workers being struck by vehicles, and an associated risk of serious injury or death. The realised risk, being the death of the deceased, was as serious as it could be.

(c) *Degree of departure from prevailing standards*. The following guidelines were available to the Herberts and TSSL:

[24] Health and Safety at Work Act 2018, s 33(3)(b).

(i) The WorkSafe Quick Guide: *Overlapping Duties* (January 2017)

(ii) The WorkSafe Fact Sheet: *Keeping safe around moving plant* (March 2014)

(iii) The New Zealand Road Code

(iv) The High Visibility Safety Garment Standards series *AS/NZS 4602-1*

All the information Herberts and TSSL needed to effectively consult with McLellan and ensure there was a safe system of work is clearly stated in these guidelines. The fact that there were multiple departures on the defendants' part, as identified by the WorkSafe investigation (see above at [15]), is aggravating. I acknowledge that some of these failings are small (for instance, the fact the deceased was wearing a hi-visibility t-shirt instead of a vest is fairly insignificant, especially since TSSL's policy required all drivers to wear a vest), and that they must be viewed in the context of McLellan having ultimate control.

(d) *Obviousness of the hazard.* The risks associated with "moving plants" are well understood in the transport industry. I do not accept the defence's submission that the way the incident occurred was not obvious. The vehicles in the shed were crossing paths in the vicinity of pedestrians – that should have been an immediate red flag for Herberts and TSSL. The fact the loader operator did not check his surroundings before reversing does not detract from the obviousness of the risk. Human error is inherently predictable. It would be wrong to permit the defendants to rely on the loader operator's carelessness to mitigate their culpability.[25]

[25] See *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526 at [52].

(e) *Availability, cost and effectiveness of means to avoid the hazard.* It would not have been particularly onerous nor cost prohibitive for Herberts and TSSL to ensure there was a safe system of work in place.

(f) *Current state of knowledge of the risks and potential harm, and of the means to avoid the hazard.* The numerous standards and guidelines identified indicate that this was a well-known hazard.

[62] The authorities put forward by counsel offer broad guidance at best. I have expanded on some of the more instructive cases below.

[63] *Toll Networks*, *Cardinal Logistics*, and *Kuehne & Nagel* involve comparable failures relating to traffic management at a moving plant.[26] Together, they provide a range of appropriate starting points for different levels of offending where a single defendant exercises control over the site in question:

(a) In *Toll Networks*, there were numerous failures. These included: failing to develop a safe system of work for the unloading of wagons; providing temporary barriers; monitoring and enforcing compliance; and failing to effectively manage interaction between forklifts and pedestrians. A worker was killed when 1,200 kilograms worth of pellets fell from a fork heist and struck them. The Judge determined that Toll must have been aware of the hazard because it had the relevant guidance material in its possession. Disturbingly, CCTV footage showed that many workers had been exposed to the very same risk over the previous twelve days. Toll had also produced safety documents which, if followed, placed workers at risk. The starting point was fixed at $900,000.

(b) In *Cardinal Logistics*, the defendant's business required staff to carry out work in a confined space at the same time as large pieces of moving machinery. The defendant had recently moved to a new premises,

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[26] *WorkSafe New Zealand v Toll Networks* (NZ) Ltd [2018] NZDC 11132; *WorkSafe New Zealand v Cardinal Logistics Ltd* [2018] NZDC 19086; *WorkSafe New Zealand v Kuehne & Nagel Ltd* [2018] NZDC 20761.

where it had begun operating before implementing any sort of traffic management plan. The victim was struck by a forklift and sustained significant injuries, requiring numerous surgeries and possibly the amputation of his leg. Cardinal Logistics was aware of the risks, and had taken "significant steps" to address them. However, as the Judge observed, "given the move to the new premises, clearly something of a lacuna in the safety plan developed". A starting point of $700,000 was considered appropriate.

(c) In *Kuehne & Nagel*, a truck driver stepped out of his vehicle and was struck by a reversing fork hoist. He survived, but received seven fractures to his left foot. Kuehne & Nagel had failed to develop, implement, and communicate a safe system of work for loading trucks, and had failed to enforce truck safe zones. Notably, the defendant had taken a "significant number of steps" in assessing the hazard and preventing injury, but some drivers had "slipped through the process" and were not protected. The starting point was $420,000.

[64] Had Herberts and TSSL been in full control of the premises, a starting point of between $750,000-$800,000 would have been in order. The present offending shares a mixture of features with each of the above cases. There was a traffic plan in place, but it was inadequate. It does not appear that many steps were taken to mitigate the risk of vehicles striking pedestrians in McLellan's part of the shed, other than the provision of driver training and PPE. The defence points out that Herberts and TSSL used safe operating procedures in the back part of the shed managed by Herberts. That may be true, but in my mind, it shows Herberts and TSSL should have been awake to shortfalls in the front part of the shed more than anything. Unlike *Toll* and *Kuehne & Nagel*, a death resulted from the defendants' failures. That is obviously a factor which requires a higher starting point. However, there is not the same level of ignorance demonstrated in *Toll*.

[65] Obviously, a lesser starting point is warranted here, given Herberts' and TSSL's limited roles in the shed. Accordingly, I draw further guidance from *Alderson*.[27] There, Alderson and a second defendant, Tegel, were both charged under s 48 in relation to the death of a chicken catcher employed by Alderson who was struck by a forklift. Alderson had engaged an expert and developed safe task procedures but had failed to ensure chicken catchers were adequately separated from the forklift. The starting point for Alderson was $700,000. The starting point for *Tegel* was $475,000, the relevant factors being essentially the same "with one step removed". Tegel had reviewed Alderson's safe task procedures and was satisfied with them. Tegel did not simply "lease the farm" as WorkSafe suggests. It had contracted farmers to grow chickens for meat production, and Alderson were enlisted to catch and remove mature chickens. As a major player in the poultry industry, Tegel wielded significant power. For instance, Alderson was required to follow procedures in the Tegel National Catching Manual and any safety documentation provided by Tegel. The context of the relationship is important.

[66] Having regard to the above, I consider a starting point of $400,000 properly reflects Herberts and TSSL's offending. I note this is also roughly consistent with my assessment of their relative culpability.

[67] As a brief aside, I note the defendant's extensive submissions on *Bulldog Haulage*,[28] where the defendant was charged under s 34(2) for failing to consult, co-operate and coordinate with its counterparts on a safe system of work at a distribution centre. The maximum fine under s 34(2) is $100,000. It is submitted that Herberts' and TSSL's failures are equally limited to a failure to consult, cooperate and coordinate with McLellan, and therefore, *Bulldog Haulage* is relevant to determining the seriousness of the Herberts' and TSSL's offending. I acknowledge the factual similarities, but there is important context to be aware of. Bulldog was one of a "multitude of subcontractors" at the distribution centre, and it had in fact raised the issue of erratic forklift driving. These aspects would have factored into the prosecutor's discretion to charge under s 34 instead of s 48, where no associated risk of harm is required. The fact remains, Herberts and TSSL are charged under s 48.

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[27] *Alderson*, above n 20.
[28] *WorkSafe New Zealand v Bulldog Haulage Ltd* [2019] NZDC 12202.

Aggravating and mitigating features of the offenders

[68] Herberts and TSSL both have multiple historical previous convictions for low-level, unrelated offending. No uplift is warranted, although I agree with WorkSafe that they can not rely on a discount for previous good character.

[69] For mitigating features, I apply the following discounts:

(a) *Reparation and steps to assist the victim – 12%.* I agree that Herbert's and TSSL's conduct in the wake of this incident has been impressive. While most of the deeds were carried out by Wayne Williams and TSSL, I accept that all the steps taken were a joint effort by TSSL and Herberts. I have already discussed the financial contributions made, but Mr Williams kept in regular contact with the deceased's widow, arranged a meeting with the loader operator as part of a restorative justice process, facilitated fundraising of $5000 for the painting of the victims' house, offered access to counselling, organised skip bins, taken the deceased's family to a car show, helped the eldest daughter obtain an apprenticeship and repaired her car. Importantly, the deceased's wife confirms that Mr Williams (acting on behalf of TSSL and Herberts) has been "really helpful throughout this process". Mr Williams, in his affidavit, stated:

> 50. I again want to express how sorry we all are about what happened on 24 February 2017. I fully acknowledge we should have done more to protect [the deceased] from harm.
>
> 51. We deeply regret what happened to [the deceased], he was a good workmate and friend. The truck [he] drove still carries his late daughter's name.
>
> 52. TSSL and Herberts continue to work very hard on health and safety in our companies. We stand by our family values which are: be customer driven, walk the talk, work together, be respectful, and get home safe.

Mr Peter Dynes, a director of Herberts, completed an affidavit in a similar vein to Mr Williams' affidavit. I commend TSSL and Herberts for their compassionate efforts in assisting the victims from

the outset. As Mr Williams said, at para 14, "…they are just what we do." I consider 12% is as high a discount as can be given here. A 15% discount would result in a reduction of $60,000, which is almost as much as the reparation Herberts and TSSL are each required to pay. This was specifically discouraged in *Hanham* and *Stumpmaster*.[29]

(b) *Remorse – 10%.* The best indication of remorse is "taking every step available to keep the word force safe".[30] Mr Williams identifies a number of steps that have been taken to improve health and safety since the accident, including:

(i) TSSL and Herberts had the General Risk Manager from HWR Group complete an ICAM incident investigation. They have used these findings to improve their systems and controls;

(ii) Toolbox meetings are held at the start of every shift to discuss hazards;

(iii) The loader driver now controls who enters the shed and when via radio communication;

(iv) The exit check procedure has been changed, so that it is done outside the shed. Both Herberts and TSSL decided they would not provide trucks unless this was the procedure;

(v) Areas have been coned off and concrete barriers have been put up. Ravensdown adopted this practice after Herberts and TSSL communicated their "learnings" from the incident;

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[29] See *Stumpmaster*, above n 6, at [66].
[30] *Stumpmaster*, above n 6, at [96].

(vi) New safety devices have been installed on all the loaders (Herberts also purchased a new loader with additional safety features);

(vii) HWR Group has run multiple critical risk projects including a focus on mobile plant and equipment.

WorkSafe suggests that TSSL and Herberts have not taken a lead role in any of the changes made at the shed. Mr Williams' evidence, which I accept, indicates otherwise. The various steps identified at (a) are also indicative of sincere remorse. The deceased's wife's comments that Mr Williams' is "really genuine" and that she knows he cares are informative and telling.

(c) *Guilty plea – 25%.* This was given at an early stage, on 3 October 2018 following an amendment to the charges.

[70] No discount is recommended for co-operation because Herberts and TSSL has done nothing more than fulfil its statutory obligations. Without any evidence that Herberts and TSSL did more than this, I agree that a discount is not required.

Calculation

[71] In total, a 47% reduction in the starting point for both TSSL and Herberts is warranted. This leaves an end fine of $212,000.

Step three: ancillary orders

[72] Section 152(1) of the HSWA provides the Court with the following discretion:

> On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).

[73] WorkSafe seeks payment of half its external legal costs, being $2500, to be split equally between Herberts and TSSL ($1250 each). They also request that

Herberts and TSSL each contribute 25% (again, based on their relative culpability) towards the costs of engaging an external expert to consider the traffic management systems in place for this matter ($600 each). They say a just and reasonable sum would be $1750.

[74] I agree that $1750 is a just and reasonable costs order.

Step four: overall assessment

[75] The "combined packet of sanctions" against Herberts and TSSL can be summarised as follows:

(a) Emotional harm reparation: $130,000 ($32,500 each is to be paid by Herberts and TSSL within 28 days of sentencing; the balance is to be met by Herberts and TSSL if it has not been paid following the outcome of McLellan's trial and/or sentencing).

(b) Consequential loss reparation: $120,128 ($69,259 of which is considered paid by Herberts and TSSL; the balance is to be met by Herberts and TSSL if it has not been paid following the outcome of McLellan's trial and/or sentencing)

(c) Fine: $212,000 (starting point: $400,000; discounts: 47%)

(d) Costs: $1750

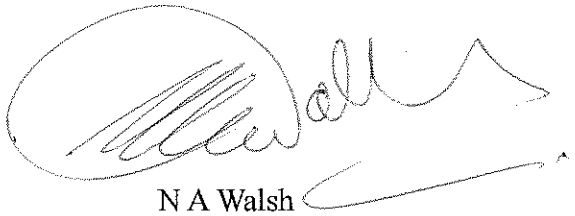
[76] Herberts and TSSL confirm that they have means to pay reparation and a "reasonable fine". However, a request has been made for a direction that the fine be paid in three equal instalments over a period of three months, due to "upcoming capital expenditure". In the absence of other evidence, I am not satisfied that requiring payment of the fine in the ordinary way would be "disproportionately severe".[31]

[31] Sentencing Act 2002, s 8(h).

Other matters

[77] WorkSafe, on behalf of the deceased's family, seeks non-publication orders in respect of the victims' names (the deceased, his widow, and two daughters) pursuant to s 202 of the Criminal Procedure Act 2011. This is sought on the ground contained in s 202(2)(a), which relates to 'undue hardship to the victims.' Herberts and TSSL support the making of the orders.

[78] There is no public interest in the names of the victims' being published, and they have already suffered significantly. I agree that the non-publication orders sought are appropriate. The order is made accordingly.



N A Walsh
District Court Judge